IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOE HAND PROMOTIONS, INC.	*	
	*	
v.	*	Civil Action No. WMN-11-1973
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DOCK STREET ENTERPRISES, INC. et al.	*	
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MEMORANDUM

Before the Court is Defendants' Motion to Consolidate, ECF No. 14, and Motion for Summary Judgment. ECF No. 10. Both of the motions are fully briefed. Upon a review of the papers and applicable case law, the Court determines that no hearing is necessary, Local Rule 105.6, and the motion to consolidate will be denied. The motion for summary judgment will be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Dock Street Enterprises, Inc. through its owners and officers operates Dock Street Bar & Grill ("Dock Street") in Annapolis, Maryland.[1] Dock Street maintains a commercial account with Comcast, a cable provider, to provide the content shown on the television sets in its establishment. Plaintiff Joe Hand Promotions, Inc. ("Joe Hand") is a Pennsylvania corporation that

[1] The Complaint identifies the principals and co-owners of Dock Street - Helene Fox, Kyle Fox and Michael Wroten - as additional Defendants. The Court will refer to Defendants collectively as Dock Street.

engages in the distribution of various sporting event programs. Relevant to this action, Joe Hand paid for and was granted exclusive television distribution rights to the Ultimate Fighting Championship 100: Making History (hereinafter referred to as "the Program"), which was telecast nationwide on July 11, 2009. Joe Hand enters into sublicensing agreements with numerous commercial establishments wanting to exhibit its programs to their patrons.

On July 11, 2009, Dock Street contacted Comcast to inquire about the pricing and availability of the Program. Comcast informed Dock Street that the rate charged for the program would be $54.99. Dock Street ordered the Program and showed it on its televisions to about 70 patrons. There was no advance promotion for the Program and Dock Street charged its standard $5.00 weekend cover charge. A charge of $54.99 subsequently appeared on Dock Street's Comcast bill which Dock Street paid.

An investigator hired by Joe Hand observed the Program being exhibited at Dock Street. Alleging that Dock Street was unauthorized to broadcast the program, Joe Hand filed this suit on July 18, 2011. The Complaint asserts the following violations of federal and state law: 1) unauthorized publication or use of communications, 47 U.S.C. § 605, 2) unauthorized reception of cable service, 47 U.S.C. § 553, and 3) conversion. The claim for conversion is subject to supplemental jurisdiction

pursuant to 28 U.S.C. § 1367. Joe Hand seeks relief in the form of statutory and/or compensatory damages, as well as reasonable attorneys' fees at the Court's discretion.

On July 29, 2011, Dock Street filed the present motion for summary judgment. First, Dock Street argues that Section 605 applies only to intercepted satellite signals, and not to cable transmissions. Second, Dock Street asserts that its payment to Comcast, combined with a reasonable inference that Comcast was an authorized provider, precludes a charge of unauthorized cable service. Finally, Dock Street insists that it is not subject to a conversion claim because no specific facts have been alleged that show wrongful intent. Alternatively, Dock Street asks this Court to decline supplemental jurisdiction for the state law claim pursuant to 28 U.S.C. § 1367. Finally, Dock Street posits that, if it prevails on its motion, it is also entitled to attorneys' fees.

In addition to the suit filed by Joe Hand, Dock Street has been named as a Defendant in a similar case. J&J Sports Productions, Inc. v. Dock Street Enters., Inc., Civil Action No. RDB-11-1596. Another distributor, J&J Sports Productions, Inc. ("J&J Sports") alleges that, on a separate night, Dock Street unlawfully exhibited a boxing program to which it had exclusive rights. Since Dock Street purchased the J&J Sports program from Comcast in the same way it purchased the Program, Dock Street

has moved to consolidate. Joe Hand opposes on the grounds that it is not related to J&J Sports, but rather is a competitor, and it does not want to share its business practices in open court. Dock Street counters that Plaintiffs, represented by the same counsel, have brought 21 similar cases this year in this Court alone, and consolidation would avoid unnecessary duplication.

II. MOTION TO CONSOLIDATE

Where there are multiple cases involving common questions of law or fact, a court in its discretion may order consolidation. Fed. R. Civ. P. 42. In exercising that discretion, courts should weigh "the interests of judicial convenience in consolidating the cases against the delay, confusion, and prejudice consolidation might cause" to the parties. Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1572 (D.N.M. 1994). The moving party bears the burden of showing that consolidation is desirable. Id.

Neither Joe Hand nor cases like this one are unfamiliar to the Court. Commercial distributors sue to enforce licensing rights numerous times each year in district courts across the country, and Joe Hand has been a party to many such suits. It is not, however, a party in the case that is pending before Judge Bennett. The plaintiff in that case, J&J Sports, is a recognized competitor of Joe Hand. Both plaintiffs oppose consolidation, citing concerns with the possibility of divulging

their unique business practices and prices during the course of litigation.

While both fact and law are similar, a lack of relatedness between the plaintiffs counsels against consolidation. Each plaintiff has the right to drive its own litigation and seek a just remedy. That both Plaintiffs have chosen to retain the same counsel is also their right. Not only would the lawyer have expertise in this area, but also attorney-client privilege precludes sharing of information. Furthermore, the unauthorized broadcasts occurred on different nights and involved different fees, so discovery would require some independent inquiry. The Court finds that Dock Street has failed to show consolidation is preferable and its motion will therefore be denied.

Dock Street raises the valid observation that, as Plaintiffs are seeking to recover attorney's fees in all of these very similar actions, the consolidation which Plaintiffs strenuously oppose would help limit, somewhat, Plaintiffs' litigation costs associated with these suits. Should attorney's fees be awarded, the Court can certainly take into account the boilerplate nature of these actions and the Plaintiffs' election to pursue them severally against the same defendant.

III. Motion for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue

as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party has the initial burden, but "the [nonmovant] is not thereby relieved of his own burden of producing in turn evidence" once it appears that there is no genuine issue of fact. Id. at 256.

In considering the motion for summary judgment, the Court first turns to the statutes alleged to have been violated. Dock Street argues that § 605 applies only to satellite signals and, by virtue of the fact that it received the Program via cable, that section is inapplicable. To be sure, both "Sections 553 and 605 have generated numerous cases which grapple with how to apply potentially overlapping provisions to various fact situations." Kingvision Pay Per View, Ltd. v. Duermeier, 24 F. Supp. 2d 1179, 1182 (D. Kan. 1998). An overlap occurs when both sections are applied to the same program, rather than tracing the violation to either satellite or cable. The difficulty arises because the life cycle of a television program quite often begins as satellite signals and ends as cable transmissions. Ambiguity arises when determining whether each

statute should apply to unauthorized interception of satellite, cable, or both.

Section 553, by its plain language, clearly applies only to cable systems:

> No person shall intercept or receive . . . any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

47 U.S.C. § 553(a)(1). Section 605, however, prohibits the unauthorized interception of "radio communication," which some courts equate to satellite transmissions and others interpret more broadly. Id. § 605(a)(6). The primary question is whether "radio communication" also applies to a cable transmission that originates from a satellite signal.

A circuit split has developed as a result of this statutory confusion. The Seventh Circuit concludes that intercepted cable transmissions are governed by § 553 only, rejecting any notion of overlap by citing the legislative history. See United States v. Norris, 88 F.3d 462, 464 (7th Cir. 1996). The Second Circuit maintains that both sections 605 and 553 may apply, as in the case of cable descramblers, also known as "black boxes." See International Cablevision, Inc. v. Sykes, 75 F.3d 123 (2d Cir. 1993). These alternative interpretations have been picked up by district courts across the country, although the weight of

authority appears to favor the position of the Seventh Circuit. The Fourth Circuit has not squarely addressed the issue.

The undersigned adopts the Seventh Circuit's view that § 605 applies to the interception of cable signals "before they begin to travel through the cable," while Section 553 applies to transmissions "at the point in the system that the transmission is carried by coaxial cable or wires." Kingvision Pay Per View, Ltd, 24 F. Supp. 2d at 1183.[2] In other words, the statutes do not overlap. Liability does not run throughout the entire lifecycle of a signal. Rather, it is the point at which the unauthorized use occurs that determines which statute applies in a given case. Not only is this interpretation more administrable, it also fits into the statutory scheme intended by Congress.

As the Seventh Circuit observed, a survey of the legislative history shows that Congress has distinguished between "wire" and "radio" for nearly a century. Norris, 88

[2] The undersigned acknowledges that other decisions of this Court have held otherwise. See J&J Sports Productions, Inc. v. Castro Corp., Civ. No. AW-11-188, 2011 WL 5244440 (D. Md. Nov. 1, 2011); J&J Sports Productions, Inc. v. Quattrocche, Civ No. WMN-09-3420 (D. Md. June 7, 2010). I note, however, that these decisions, like many of those finding that both statutes apply to intercepted cable transmissions, were decided on motions for entry of default judgment and thus, the applicability of § 605 to a cable program was not clearly placed before the Court. Furthermore, from the allegations in a complaint alone, it is often not apparent whether the programming was intercepted as a satellite or a cable transmission.

F.3d at 464-66. The first substantive regulations in this area, enacted in 1912, made the two technologies mutually exclusive, whereby "radio was essentially defined as any electronic telecommunication that was not a wire communication." Id. at 464. In 1968, the term "wire" was altogether removed from Section 605, except for the first clause, which regulates communications personnel rather than unauthorized reception. Id. at 465. With adoption of Section 553, Congress further defined the dichotomy between wire and radio. The Committee report explained that those cable services transmitted "over-the-air" (by satellite) continue to be subject to Section 605, but only "'to the extent reception or interception occurs prior to or not in connection with, distribution of the service over a cable system.'" Id. at 466 (quoting H.R. Rep. No. 934, at 83-84, reprinted in 1984 U.S.C.C.A.N. at 4720-21). It is this reasoning that the Court follows today.

In opposition, Joe Hand argues that final delivery by cable "does not change the nature of the stolen transmission itself." That's Entertainment, Inc., 843 F. Supp. at 1000. Taking this statement to its logical conclusion, however, would make Section 553 altogether redundant of Section 605. Given that the major networks transmit their programs to the cable company using satellite signals, all cable would also be classified as satellite. Congress could not have intended the very same act

to be covered by two statutes, each carrying a different damage award. There must be something distinct about "wire" and "radio," cable and satellite. To be sure, Defendants may be liable under both statutes, but only if unauthorized use occurs at both points in the system. Since Dock Street intercepted the Program as a cable transmission,[3] it is subject to Section 553 only and Dock Street's motion will be granted as it relates to a violation of Section 605.

Dock Street also seeks to avoid any liability under Section 553 because it purchased the Program in good faith.[4] It argues that the Court may "reasonably infer" that Joe Hand had "some sort of agreement with Comcast" to carry the Program and market it to Comcast customers. ECF No. 12 at 6. At this stage in the litigation, however, inferences are to be made in favor of plaintiffs, not defendants. Furthermore, the statute itself is

[3] The affidavit submitted by Dock Street establishes that it received the Program through the cable service provided by Comcast. Fox Aff. ¶ 7. Without offering anything to call that affirmation into question, Plaintiff suggests that it is premature to determine liability under § 605 because, "at this time a secondary violation via satellite cannot be ruled out." ECF No. 15 at 8. Where Dock Street acknowledges that it showed the Program through its cable connection, there is no logical basis to posit or imagine some secondary satellite violation.

[4] Plaintiff notes that Comcast's 14-page Terms and Conditions document includes a disclaimer that authorization must be received not just from Comcast, but also "the applicable program or event distributor," in this case Joe Hand. ECF No. 15-1 at ¶ 21.1. Contrary to the Comcast bill, which Dock Street paid, Joe Hand's rate was $925.00 for a commercial establishment the size of Dock Street to show the Program.

a strict liability statute and precludes a good faith defense; knowledge is only relevant when assessing damages. 47 U.S.C. § 553(c)(3)(C) (allowing in situations where the Court finds that that violator "was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100"). The Complaint alleges and the affidavit submitted by Plaintiff in opposition to the summary judgment motion reaffirms that Dock Street exhibited the Program without authorization and that is sufficient, at this stage, to establish liability under Section 553. Compl. ¶ 12; Joe Hand Jr. Aff. ¶ 3.

The Court now turns to the remaining state law claim, which is for conversion. Conversion requires "a distinct act of ownership or dominion exerted by a person over the personal property of another which either denies the other's rights or is inconsistent with it." Parker v. Kowalsky & Hirschhorn, P.A., 722 A.2d 441, 447 (Ct. Spec. App. Md. 1999). Essential to such a claim is a showing that the defendant intended to assert a right that was inconsistent with ownership. See Restatement (Second) of Torts § 222A (1965). Dock Street maintains it purchased the Program in good faith, arguing throughout the motion that any violation was at most an honest mistake. Plaintiff counters, however, that Dock Street's contract with

Comcast included a disclaimer clearly stating that authorization must be received not just from Comcast, but also "the applicable program or event distributor." ECF No. 15-1 at ¶ 21.1. While it is perhaps questionable that a cable customer would be familiar with all the fine print in their cable contract, this provision creates at least an issue of fact as to Dock Street's good faith. Accordingly, it is premature to dispose of this claim and Dock Street's motion will be denied as it relates to the state law conversion claim.[5]

Finally, the Court seeks to clarify which of the parties might be eligible to receive attorneys' fees in this case. Pursuant to 47 U.S.C. § 553(c)(2)(C), the court may direct recovery of costs, including reasonable attorneys' fees, to an "aggrieved party" who prevails. An aggrieved party is defined as "any person with proprietary rights in the intercepted communication." 47 U.S.C. § 605(d)(6). While an award is mandated for violations of Section 605, it is discretionary for violations of Section 553. Charter Communications Entm't I, LLC v. Burdulis, 367 F. Supp. 2d 16, 20 (D. Mass. 2005). As Joe Hand rightly points out, Dock Street is not the "aggrieved party" in this case. It had no proprietary rights to the

[5] The Court notes that, where there is recovery under § 553, courts will generally not also allow recovery under a conversion claim as that would result in a double recovery. See J&J Sports Prod. Inc. v. J.R. 'Z Neighborhood Sports Grille, Inc, Civ. No. 9-3141, 2010 WL 1838432 (D.S.C. Apr. 5, 2010).

Program, and is therefore not entitled to an award of attorneys' fees regardless of the end result.

For the reasons stated, Defendants' Motion to Consolidate is DENIED and the Motion for Summary Judgment is GRANTED in part and DENIED in part. A separate order consistent with this memorandum will be issued.

/s/

William M. Nickerson
Senior United States District Judge

DATED: December 8, 2011.